

Randall Division of Textron, Inc. and Sandra L. Shutts and United Brotherhood of Carpenters and Joiners of America, Local Union No. 2540, AFL-CIO. Cases 9-CA-26355 and 9-CA-26593

April 24, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On February 20, 1990, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.¹

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider for hire former employees who had engaged in a protected strike and whose statutory reinstatement rights had expired pursuant to the terms of a strike settlement agreement. The Respondent argues in exceptions that it acted lawfully pursuant to a strict, nondiscriminatory policy against rehiring any former employee. For the reasons set forth below, we find merit in the Respondent's exceptions.

The Respondent manufactures automobile parts in its Wilmington, Ohio plant. The United Brotherhood of Carpenters and Joiners of America, Local Union No. 2540 has been the bargaining representative of the Respondent's production and maintenance employees at the Wilmington plant since 1967. On July 10, 1987,² unit employees commenced an economic strike.

According to the uncontradicted testimony of Cecil Puckett, the Respondent's personnel manager at the Wilmington facility, the Respondent had long maintained a general informal policy of not hiring former employees, in light of dissatisfaction with the performance of those who were rehired. Puckett admitted that he "did not enforce totally" this policy. Prior to the strike, the Respondent did rehire a "very, very small number of persons."

When the strike occurred, Puckett faced the prospect of hiring a large number of replacement employees in a short period of time. According to Puckett, the applications of former employees presented problems in identifying quickly the basis on which they had previously been terminated. Puckett believed that these

problems would be exacerbated with the arrival on August 3 of corporate personnel from Cincinnati to conduct the Respondent's hiring in lieu of Puckett, who was occupied with other strike-related matters. Puckett asserted that these individuals, having no familiarity with former employees or current supervisors in Wilmington would likely have greater difficulty in researching the reasons for prior terminations. According to Puckett, he and other corporate officials, therefore, decided on August 1 to adopt a strict formal policy against hiring former employees. The policy went into effect on August 3.

There were approximately 187 replacements hired between August 3 and 19. Twenty-three former employees, who had ceased work before the commencement of the strike, applied for jobs during this period. Consistent with the strict no-former employee hiring policy, none of these applicants was rehired.

On August 19, the Union and the Respondent entered into a strike settlement agreement. The agreement limited strikers' recall rights to a 1-year period, after which all unreinstated former strikers would be terminated. During the recall period, the Respondent did not accept applications for new hires. It recalled approximately 200 strikers. On August 20, 1988, in accord with the strike settlement agreement, the Respondent terminated the employee status of approximately 150 former strikers who had not been reinstated.

For 10 to 12 years prior to the strike, the Respondent had used the Ohio Bureau of Employment Services (OBES) as its principal source for the referral of job applicants, except for skilled employees unavailable through OBES. Puckett testified that OBES referral records were useful to the Respondent in administering its affirmative action program. In hiring replacements during the strike, however, the Respondent did not use OBES because state law precluded that agency from referring applicants.³ Having restricted its poststrike hiring to former strikers throughout the settlement agreement period, the Respondent did not again seek new job applicants until October 11, 1988. At that time, it resumed using OBES as its primary referral

³The judge at fn. 11 of his decision found no evidence proving the existence of such a prohibition. The Respondent has filed a motion requesting the Board to take judicial notice of an excerpt from the OBES Security Manual, part II, sec. 1278.7, which states in relevant part:

Withholding referrals to jobs involved in labor dispute. The local office must not make referrals which will aid directly or indirectly in filling a job that is vacant because the former occupant is on strike or is being locked out in the course of a labor dispute, or the filling of which is an issue in a labor dispute.

Members Devaney and Oviatt grant the Respondent's motion and take official notice of this excerpt. Member Cracraft would not grant the motion because she finds that evidence about the Respondent's failure to use OBES during the strike is irrelevant to the General Counsel's theory of unlawful discrimination in this case. As stated later in this decision, the General Counsel has not alleged or litigated discriminatory intent in the Respondent's use of OBES. Accordingly, there is no reason to admit evidence concerning that use. Member Cracraft expresses no view about whether the Board should take official notice of the kind of evidence proffered, where it is relevant.

¹The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issue and positions of the parties.

²All dates are in 1987, unless otherwise indicated.

source. Thereafter, the Respondent would not accept directly filed employment applications and did not seek job applicants independent of the OBES referral system, again except for certain skilled positions. From October 1988 to March 1989, OBES referred at least 342 applicants to the Respondent, which hired at least 108 of those referred.

The Respondent's no-former-employee hiring policy was well known both to ex-strikers and to OBES employees, some of whom would inform former employees of the Respondent about the policy. OBES did not, however, vary its standard job referral procedures to accommodate the no-former-employee policy. In fact, approximately 27 former employees who registered with OBES, including 3 ex-strikers, were referred to and rejected by the Respondent. The Respondent did apparently hire two former employees referred by OBES.

The judge concluded that the Respondent had intentionally followed a hiring procedure in October 1988 which was designed to eliminate from consideration all ex-strikers who desired reemployment. He found no need to decide whether the August 1, 1987 decision to adopt a strict no-former-employee policy was discriminatorily motivated. Instead, he first questioned why the Respondent resumed use of OBES as a primary referral source. The judge found it "hard to believe" that the alleged utility of OBES records in maintaining the Respondent's affirmative action program could have been important during a concentrated period of mass hirings. As previously mentioned, he also found no record support for the Respondent's claim that it could not resort to OBES during the strike, a similar period of concentrated hirings. In the judge's opinion, OBES was useful for occasional referrals of small numbers of employees, but the Respondent's failure to resort to an available pool of 150 experienced former employees to meet mass hiring needs in and after October 1988 warranted the inference of unlawful discriminatory intent.

In like fashion, the judge questioned why the Respondent adhered to its no-former-employee hiring policy after the strike-related problems allegedly justifying such a policy had ceased to exist. He further reasoned, however, that this question was irrelevant because he found that the hiring of two former employees after October 1988 proved that there was no strict policy against hiring former employees. Accordingly, he inferred that the reaffirmation of such a policy was a pretextual device to eliminate the terminated former strikers from consideration for rehiring.

Contrary to the judge, we find that the General Counsel has failed to prove a prima facie case of discrimination against former strikers. Initially, we find that the record is bereft of any independent evidence of animus borne by the Respondent against the Union

or those who engaged in protected strike activity. On the contrary, the Respondent has had a collective-bargaining relationship with the Union for over two decades, it apparently complied with its obligations under the strike settlement agreement, and it undisputedly hired approximately 200 former strikers pursuant to that agreement.

We further find no basis for inferring discriminatory intent from the Respondent's use of OBES as an exclusive referral source of applicants for unskilled production jobs. The judge's finding on this point exceeds the scope of the theory of violation litigated. The complaint does not allege and the General Counsel has not contended that the Respondent's reliance on OBES was itself discriminatory or was evidence of discriminatory motivation in the Respondent's postsettlement agreement hiring practices.

Furthermore, it is undisputed that the Respondent had used OBES for 10 to 12 years prior to the strike. There is no basis for finding it would not have continued to do so during the strike but for OBES policy precluding the referral of applicants to replace strikers.⁴ When the Respondent began hiring new employees after the strike settlement period, it merely resumed a past practice of using OBES. There is no evidence that OBES referral procedures, in general or in specific relation to the Respondent's hiring, discriminated against applicants who had engaged in protected strike activities. Furthermore, OBES did refer ex-strikers to the Respondent in and after October 1988. In the absence of any independent basis for inferring unlawful motivation in the Respondent's use of OBES, we find no need to address the substance of the Respondent's reasons for preferring OBES to a direct hiring system. We disavow any reliance, however, on the judge's observations about the limited utility of this employment agency as a source of applicants and in maintaining affirmative action records.

We also disagree with the judge's findings with respect to the Respondent's no-former-employee policy. In the absence of exceptions to the judge's failure to pass on the issue, there no longer is any contention that the Respondent was discriminatorily motivated in adopting a strict policy on August 1, 1987. Moreover, there is no evidence that the Respondent at that time knew or reasonably should have known that the parties would enter into a strike settlement agreement that would terminate strikers' statutory reinstatement rights which, absent such agreement, would have been unaffected by a strict policy against rehiring former employees.

We also find, contrary to the judge, that the Respondent did maintain its strict policy in and after October 1988. The hiring of two former employees from

⁴For reasons previously discussed, Member Cracraft finds no need to rely on this settlement.

among hundreds of employees referred by OBES is insufficient to prove either that no strict policy existed or that it was applied only to exclude former strikers. On its face and in practice, with the two exceptions noted, the policy excluded all former employees, whether or not they had engaged in protected strike activity. Without independent evidence of discriminatory intent, the Respondent bears no burden of justifying its maintenance of a lawfully promulgated no-former-employee policy.

A fundamental element of the judge's rationale for finding a violation of Section 8(a)(3) was his disbelief that the Respondent, needing to hire what the judge termed large numbers of employees in a short period of time, would not first resort to an available source of experienced job applicants, that is, the group of terminated former strikers. This reasoning ignores the fact that, while an employer cannot unlawfully discriminate against former employees or experienced workers in its hiring practices, it likewise has no obligation to prefer them.⁵ As previously stated, there is no basis for inferring unlawful motivation in the Respondent's hiring practices after October 11, 1988. In finding discrimination the judge has substituted his own business judgment for the Respondent's with respect to the value of experienced former employees.

Based on the foregoing, we find that the General Counsel has failed to prove that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire unlawfully terminated ex-strikers pursuant to a policy of not hiring any former employees. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

⁵ E.g., *Monfort of Colorado*, 298 NLRB 73, 78-79 (1990). That case makes clear that an employer, however, cannot unlawfully discriminate against former employees or experienced workers. We find no such unlawful discrimination here, as discussed above.

James E Horner, Esq., for the General Counsel.
Michael W. Hawkins, Esq., and *Robert D. Hudson, Esq.*
(*Dinsmore & Shohl*), of Cincinnati, Ohio, for the Respondent.

Sandra L Shutts and *Daniel Drake*, of Wilmington, Ohio, for the Charging Parties.

DECISION

BERNARD RIES, Administrative Law Judge. This matter was heard in Xenia, Ohio, on September 7, 1989.¹ The consolidated complaints allege that on or about several specified

¹ The charge in Case 9-CA-26355 was filed on April 12, 1989, and the complaint thereon was issued on May 30, 1989. The charge in Case 9-CA-26593 was filed on June 29, 1989, and amended on July 26, and the complaint in that case was issued on August 11, 1989, together with an order consolidating the two cases for hearing.

dates in 1988 and 1989, Respondent,² in violation of Section 8(a)(1) and (3) of the Act, "refused to accept an employment application from or offer employment to" four named employees, and has, since October 1988, similarly treated "other individuals whose names are unknown to the [Acting Regional Director], who were employed by Respondent at the time of the strike in July 1987."

Briefs were received from General Counsel and Respondent on or about November 11, 1989.³

Having considered the entire record and the briefs, I make the following

² As amended at the hearing.

³ General Counsel also has moved, by a motion dated November 3, 1989, that the employment application of Theresa Rosenwirth attached to the motion be marked as G.C. Exh. 9 and received in evidence. In its brief, Respondent has opposed the receipt of this document.

Respondent's opposition comes as a surprise. As discussed hereafter, at the hearing, Cecil Puckett, Respondent's principal witness, testified that on August 3, 1987, while a strike was in progress, Respondent adopted a strict policy of refusing to rehire former employees, and that Respondent has adhered to that policy ever since. In questioning this claimed strict adherence, counsel for General Counsel asked Puckett about an employee named Theresa Rosenwirth. Puckett agreed that Rosenwirth has been hired as an accounting department clerk, but said that she had not, to his knowledge, previously been employed by Respondent. Counsel for General Counsel represented that he had subpoenaed the personnel files of former employees and did not receive a file for Rosenwirth, although his information was that she had been employed in the production and maintenance bargaining unit from 1978-1979. While he assumed, "for the sake of argument, that it was overlooked, or forgotten, or whatever," counsel for General Counsel stated that he desired to have Rosenwirth's file "before we close the record."

After an off-the-record discussion, the following colloquy occurred:

JUDGE RIES: The parties, off the record, have reached an agreement that, instead of seeking immediate compliance with General Counsel's subpoena with regard to Theresa Rosenwirth—that's R-o-s-e-n-w-i-r-t-h—the Respondent will, after the close of the hearing, as soon as possible, submit the personnel file, or copies of the appropriate documents, to Mr. Horner. And he will, in turn, submit the personnel file, or copies of the appropriate documents to Mr. Horner. And he will, in turn, submit that to me, if he wishes, marked as the final General Counsel exhibit. Is that our understanding, gentlemen?

MR. HORNER: Yes, sir.

MR. HAWKINS: Yes, your Honor.

JUDGE RIES: All right.

With respect to that, let me just ask one question of the witness: Mr. Puckett, when you're sitting there, interviewing applicants, would you have an application form which shows their prior employment? We would also want the form that Mr. Puckett had, probably had, before him when he was interviewing her. That should be in evidence too. You may proceed, Mr. Horner.

It could scarcely be clearer that, rather than prolong the hearing until Rosenwirth's file was obtained, Respondent was agreeing to furnish the material to General Counsel for introduction into evidence without further testimony. Now that General Counsel has transmitted the Rosenwirth application, Respondent argues on brief:

Because G.C. Exh. 9 was proffered for introduction on November 6, 1989, after hearing, Randall cannot be held to have waived objections at hearing. Further, there was no evidence taken on this issue. Accordingly, Randall hereby objects to the introduction of G.C. Exh. 9. In view of General Counsel's comments regarding the unintentional nature of the company's deviation, as well as the above authority [referring to cases holding that inconsistency of treatment does not necessarily establish an unfair labor practice], Randall maintains proffered G.C. Exh. 9 is irrelevant to any discrimination determination, as it documents an industrially typical deviation not probative of unlawful motive. [Emphasis in original.]

Clearly, Respondent did "waive objections at hearing." It may further be noted that General Counsel's comments accepting, arguendo, a lack of willfulness were plainly not addressed to "the Company's deviation" from its hiring policy, but rather to the failure to comply with the subpoena.

Accordingly, I receive in evidence as G.C. Exh. 9 the application of Theresa Rosenwirth dated January 16, 1989.

FINDINGS OF FACT

I. THE FACTS⁴

Respondent produces automobile parts. Of the 8 plants in the division as of July 1987, we are concerned with the one in Wilmington, Ohio, at which the 600 production and maintenance employees have been represented by the Charging Party Union since 1967.

Cecil Puckett has been the personnel manager at the Wilmington facility for 24 years. He testified that prior to a bargaining strike which erupted on July 10, 1987, he maintained a policy, which he "did not enforce totally," of not hiring former employees. It had been his experience, Puckett testified, that rehired former employees did not, for one reason or another, work out; nonetheless, Respondent did rehire a "very, very small number of persons."

Puckett told us that after the strike began, and Respondent began interviewing and hiring replacements, he realized that those applicants who had been terminated by Respondent prior to the strike (a "very small number" of who were in fact rehired during the first 2 weeks of the strike) had become a source of "stress" to him. The stress resulted from the fact that sometimes the personnel file of the former employee did not specify why he or she had been terminated, and the absence of this information would require Puckett to search around among the supervisors to unearth the missing facts.

The problem thus assertedly created by former-employees-whose-personnel-files-failed-to-identify-the-basis-on-which-they-were-terminated (termination omissions) would be exacerbated, Puckett assumed, by the fact that, around August 3, coming from division headquarters in Cincinnati to assist Puckett in hiring (Puckett being caught up in other matters) would be certain headquarters employees who, unlike Puckett, were totally unacquainted with past employees and present supervisors, and who would encounter even more stress in tracking down termination omission information. Accordingly, probably on August 1, 1987, Puckett met with Dicks, the industrial relations manager for the division, and Plant Manager Carl Mayes, at which time they adopted a policy of not rehiring former employees, the policy to become "effective" on Monday, August 3. No written notation of the policy was made and neither Hicks nor Mayes testified, but Harry W. Burge, a manager of employee relations located in Cincinnati and holding divisionwide responsibilities, testified that he came to Wilmington on August 3 or 4 to assist in hiring employees and was told that such a policy had been adopted. On August 19, 1987, the strike ended. A strike settlement of that date provided, inter alia, for recall of strikers by classification on a seniority basis, except that at the end of 12 months, "any employee who has not been recalled shall be terminated." During the following 12 months, Respondent reinstated approximately 200 strikers, leaving about 150 strikers stranded on the recall list as of their termination date of August 19, 1988.

According to the uncontradicted testimony, for 10 or 12 years prior to the strike Respondent had used the Ohio Bureau of Employment Services (OBES) as the principal refer-

ral source of its potential employees (with the exception of certain skilled employees whom OBES often could not supply). The record shows that at the end of the 12-month recall period, Respondent decided to resume the use of OBES for referral of applicants. It did not, however, after the recall period ended on August 19, 1988, begin to seek out additional employees until October 11, 1988, at which time Respondent gave OBES an order for 25 production machine tenders—a job requiring no qualifications other than attainment of age 18 and a 9th grade education. The record reveals that throughout October 1988 and into March 1989, Randall continued to ask OBES to refer more employees, and, by March 1989, OBES had referred at least 342 applicants and Randall had hired at least 108 of them.⁵ Since, as Puckett testified, Respondent had determined to adhere to the strict no-former-employees policy and also to hire by referral from OBES once the 12-month recall period had ended, it made no attempt directly to hire any of the approximately 150 unrecalled former strikers, and in fact asserts that it rejected three such ex-strikers who actually were referred to Respondent by OBES, in addition to 44 other referred ex-employees whose employment had ended in circumstances unrelated to the strike and who applied between August 3, 1988, and May 17, 1989 (R. Exhs. 13 and 14).

According to Karen Cook, manager of the Washington Courthouse, Ohio office of OBES,⁶ when an employer orders referrals, OBES employees will conduct a file search for applicants with requisite qualifications. Given first priority are three categories of veterans. Thereafter, if more applicants must be found, a further search is conducted by examining social security numbers, the lowest numbers first when I noted that such an arrangement seemed to prefer older applicants, Cook could only say that this system is "the way we've been taught to do." But she also said that an applicant's length of time on file is (in some unexplained way) factored into the selection process ("Well, we're not going to take somebody who walked in today and registered for work and send them, say, to Randall's, as opposed to somebody who came in six months ago . . ."). After locating active applicants, OBES arranges appointments with Respondent for them and gives them referral slips.

However the selection process operates, the summary prepared by Respondent shows that it resulted in only three strikers (none of who are named in the complaint) actually making application to Randall after having been referred by OBES pursuant to Randall's October 11, 1988 and subsequent orders.⁷ The evidence discloses that when, in October, Respondent began the hiring process, OBES received some telephone calls evidently questioning whether it was true that former employees could not be referred. Jerome Miller, an OBES supervisor at Washington Courthouse, spoke to rep-

⁴For purposes of clarity, the transcript is corrected as follows: At p. 15, L. 19, change "Judge Ries" to "Mr. Horner"; at P. 41, L. 9, change "and" to "in"; at P. 49, L. 8, change "lot" to "long."

⁵I derive these figures from R. Exhs. 1-8, which presumably are intended to show all OBES referrals and hires for the period of October 1988-June 1989 (see Tr. 52-53). However, the accuracy of these documents are thrown into question by R. Exh. 13, a summary of referrals prepared by Respondent and received in evidence without question. As examples of inconsistencies, applicants Andrew, Crosby, Brooks, Elchert, Bentley, and Harper appear on R. Exh. 13 but not on R. Exhs. 1-8. I am not sure what to make of these contradictions.

⁶The Washington Courthouse office services Clinton County, in which Wilmington is located. The Wilmington plant is also indirectly serviced by the OBES Hillsboro office.

⁷These were Douglas Andrew, who applied with Randall on October 12, 1988; Troy Elchert, on October 19; and Richard Arthur, on October 21.

representatives of Respondent to inform them that OBES could not refuse to refer former employees. Puckett told Miller that he had no problem with interviewing former employees, but that Respondent did maintain a policy that it "would not hire former employees."

It is clear that this information was widely disseminated to former employees, including terminated ex-strikers. Miller heard about it in October, when told by members of his staff who, Miller testified, had learned about the policy from former Randall employees; this was what led Miller to call Randall to clarify OBES's policy. Miller also testified that his office received a "lot of calls" from former employees who "knew that policy by word of mouth." Patricia Clark was told by OBES employees in October or November that Respondent was not rehiring former employees, which fact she also heard around the same time at union meetings and from "the different employees that work [at the plant] now." Several other ex-strikers testified that they were told about the policy by OBES employees.

As earlier stated, the complaint alleges, with respect to four named employees and an undetermined number of others, that Respondent "refused to accept an employment application from or offer employment to" such employees. As to the four identified employees, it cannot be said that Respondent "refused to accept an employment application" from them because (1) these employees did not actually proffer any such forms to Respondent and (2) under the OBES referral system which Respondent chose to resume after the strike, hiring is, as explained above, simply not done that way.

For example, Sandra L. Shutts, a Charging Party here and one of the four named discriminatees, having heard that Randall was hiring, went to the Washington Courthouse office on January 17, 1989, and was told by OBES employee Conaway that Randall was not hiring former employees. She nonetheless filled out an OBES form, but she was never referred by OBES for an interview with Randall.⁸

Joan Allen, who is also mentioned in the complaint, had worked at various jobs for Respondent for 13 years before she went on strike in 1987. She registered for employment with the Lebanon, Ohio office of OBES on July 21, 1988, and, also, around January 1989, went to that office and told the OBES agent that she had heard Randall was hiring. The Lebanon office called the Washington Courthouse office and was informed that all Randall openings were filled at the time. That same month, having been so advised by (apparently) a representative of Randall, she visited the Washington Courthouse office, asking to be registered there. Allen was told that she had to first take some sort of 2-hour course, for which she was given an appointment scheduled for 1-1/2 months thereafter. However, after hearing from both present and former employees in 1989 (for the first time) that Randall was not hiring former employees, she did not keep the appointment.⁹

Evidence was adduced as to two other named former employees, James Henthorn, a 5-year employee who was the subject of the original charge in Case 9-CA-26593, and Patricia Price Clark, who had worked for Respondent for 15

years before going on strike. In addition, General Counsel elicited testimony from employees not expressly named in the complaint. Dan Phipps, who had been employed for 4 years before the strike, David Shutts, a 5-year employee, and Orville Malatt, who had devoted 32 years of his working life to Respondent prior to the strike, all testified that they had applied with OBES in October or November, but had not been called to be interviewed. Although the record shows that some of the employees became temporarily or permanently inactive in the OBES files because they failed to comply with the OBES requirement that they renew their application every 60 days, and that there may have been other application defects, the stark fact is, as Puckett agreed at the hearing, that even if these and other unrecalled ex-strikers had been referred, they would not have been rehired because they fell into the category of "former employees."

II. DISCUSSION AND CONCLUSIONS

The subject on which the trial of this case was focused, and which was completely litigated, was whether the Respondent's refusal to consider for employment four named and other unknown ex-strikers violated Section 8(a)(3) and (1). On brief, General Counsel advances the contention that the August 1, 1989 "decision not to rehire former employees was motivated, in whole or in part, by Respondent's desire to keep out of its work force as many of the strikers [as] it could." While I find that the August 1 decision is indeed suspicious, for a number of reasons which should be obvious, I do not consider that decision to be the central issue here.¹⁰ Rather, two fundamental questions occur to me.

First, I find it difficult to understand why Respondent chose, when it began hiring in October 1988, to reestablish its referral relationship with OBES. At the hearing, Puckett emphasized that OBES was useful to Respondent in the maintenance of its affirmative action program, apparently because of the records maintained by OBES. It is hard to believe, however, that this factor could have been of such importance at a time when Respondent interviewed over 300 applicants and hired more than 100 employees in a span of less than 5 months. Respondent did not, I note, avail itself of OBES' services when it was hiring 187 employees (out of an unknown number of applicants) during the strike.¹¹ Moreover, the record shows that Respondent continued, in and after October 1988, to directly advertise for and hire employees with skills not available from OBES.

Referral by OBES may be a useful service during normal times when Respondent probably requires a small number of employees sporadically. But in October 1988 and thereafter, there was an abnormal and ongoing call for substantial numbers of employees; and there was in existence, simultaneously and extraordinarily, a group of perhaps 150 experienced former employees on the expired striker recall list. It is true, of course, that by the terms of the strike settlement, these ex-strikers had been "terminated" from employment as of August 19, 1988. Nonetheless, their presence on the list

¹⁰On the basis of the testimony of Harry Burge, who seemed to me to be an honest witness, I conclude that Respondent did adopt a policy, on or about August 1, not to consider former employees for employment during the strike.

¹¹While Respondent's brief states that OBES refused to refer applicants during the strike because of an "internal policy of not becoming involved with labor disputes (Tr. 147)," neither the cited page nor any other transcript source supports this assertion.

⁸She filed her charge on April 12, 1989.

⁹The charge in Case 9-CA-26593 was amended on July 26, 1989, to refer specifically to Allen and Patricia Price Clark, alleging discrimination against them since on or about January 4.

reasonably indicated to Puckett that they were interested in returning to work; and, at the same time, they constituted the most promising source of employees, many of them having worked, one may infer from this record, for extremely long periods of time at the very same plant at which workers were needed (e.g., Allen, 13 years; Clark, 15 years; Malatt, 32 years). Instead of taking advantage of this seemingly splendid opportunity and approaching these employees directly, Respondent chose to hire through OBES, apparently preferring to take a chance with wholly inexperienced employees rather than to seek out old hands.

It may similarly be argued that, to guard against the possibility that not more than a few of the terminated ex-strikers filtered through the OBES system and thus confronted Respondent with the need to make a decision about hiring them, Respondent continued to apply the "no former employees" policy adopted during the strike. The question that I consider to be critical here is why, after the recall period ended in August 1988, Respondent assertedly kept in effect a strict policy which, in at least 24 years of operation prior to the strike, Puckett had not thought necessary to adopt as an inflexible rule?

Puckett was at least able to give some reason for concluding that a stringent "no-former-employee" rule made sense during the strike while it is truly difficult to imagine that the files of so many former employees were deficient in failing to show why such employees were terminated that it actually created a source of "stress" for Puckett in tracking down those reasons,¹² there may be something to the claim that doing so would have presented greater difficulty for Burge, a stranger to the operation. But by October 1988, the hiring process was back to relative normality; why would Puckett have doggedly adhered to the new policy and made it notorious that Respondent would not be hiring any former employees, at a time when workers were needed and some 150 unrecalled strikers were still out there?

Puckett told us that, prior to the strike, he had adopted a "general" policy of not rehiring former employees, even though he had not strictly enforced the rule when employees had spoken to Puckett about quitting in order to take a vacation or to try out a new part of the country for a while, he would tell them they "won't be coming back." He also testified (without any supporting documentation) that the rehires he has made in the past "didn't really work out well for us," citing difficulties with former employees learning new work processes, extremely high absenteeism, and terminations "beyond a reasonable rate."

But the applicants we consider here are not those dubious prospects who flitted off to Florida, or who were fired for poor work performance;¹³ these strikers were obviously satisfactory workers who had been employed by the Respondent for as many as 32 years, and who left to walk a picket line, not to disport themselves in southern climes. There was simply no rational basis for Respondent to continue to apply the "rule" to these ex-employees for any of the reasons given by Puckett as the underlying causes for originally adopting

such a rule. Indeed, the very idea of applying a strict policy which would exclude such seasoned veterans as Allen, Clark, and Malatt in favor of totally unknown novices must be considered, from a purely practical point of view, ludicrous.¹⁴

But the insubstantial nature of any possible reason for continuing in effect the "strict" policy even after the recall period had ended is made irrelevant by the evidence that, in fact, there was no such strict policy. Theresa Rosenwirth had worked as a production employee for Respondent from October 1978 to September 1979, when she left to join the Army. Evidence of this earlier employment is shown not only in her summary of work experience on the back page of her January 16, 1989, application, but also appears prominently at the top of the front page, where, in response to the question "Were You Ever Employed By This Company?," she marked the answer "Yes" and then wrote in the dates and the location, as requested. Any reviewer of this application would have had to be performing in a distressingly unsatisfactory manner to have missed this information.

At the hearing, Puckett knew that Rosenwirth had been hired as a clerical employee, but his "knowledge" did not, he claimed, encompass the fact that she had previously been employed at the plant. I do not believe him. Even Jerome Miller, the OBES supervisor at Washington Courthouse, was clearly aware of this exception Miller testified, "To my knowledge, we [sic] had one former employee hired in a clerical position. . . . All [former employees who were interviewed were] not hired but one." How Miller would come to possess this specific information about Rosenwirth, I do not know. It does not appear to be knowledge which would be relayed to him in the ordinary course of business or that he would independently notice I feel certain that if Miller knew it, Puckett or some equally responsible official aware of the "rule" also was cognizant of it.

It also appears that there is at least one other former employee who has been rehired Puckett testified as follows:

[Q.] Do you recall hiring, in 1989, a former production worker for a non-bargaining unit job?

A. Yes, sir.

Q. Who was that?

A. The name has slipped my mind. I believe this person had acted, been a guard.

Q. Pardon?

A. Had this person been a guard? That's the only one I can not sure, sir I'm not sure who it was.

Puckett may not have been sure "who it was," but he unequivocally did recall hiring, in 1989, a former employee (perhaps a guard). Since he went on to say that he was unaware that Rosenwirth was a former employee, Puckett must have been referring to someone else.

It follows from the existence of these exceptions that there was no "strict" policy against hiring former employees. I infer from this and the preceding discussion that the reaffirmation of such a policy in and after October 1988, when Respondent needed employees and there was a choice pool of recent ex-employees who had left their jobs only to go on strike, was an attempt by Respondent to eliminate from con-

¹² Puckett was unable to even make a guess at the hearing as to how many former employees had been interviewed prior to adoption of the "strict" policy.

¹³ As Respondent states on brief, "The reason for these performance deficiencies is simple—employees that don't 'work out' in their first period of employment likewise do not tend to work out in the reemployment context."

¹⁴ Witness Burge, who exercises responsibility at the divisional level, testified that he is unaware of a stated policy at any of the other plants in the division prohibiting the hire of former employees.

sideration for reemployment all ex-strikers who desired reemployment. Indeed, "[T]here is no other reasonable explanation for the company's pattern of hiring," *American Press, Inc. v. NLRB*, 833 F.2d 621, 625 (6th Cir. 1987). She purported adoption and application of such a policy for the reason found is violative of Section 8(a)(3) and (1).

Although General Counsel has not referred on brief to *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), or any cases in that line of authority, Respondent offers a lengthy discussion of why the *Great Dane Trailers* principles relating to "inherently destructive" and "comparatively slight" discrimination do not apply. Since I have concluded that the evidence shows that Respondent's decision to adopt a stance of shutting out all former employees was made in order to ask its determination to disqualify all former strikers, I need not discuss the application of *Great Dane Trailers*.¹⁵

The remedy appropriate to the violation found here may present difficulties. While it is not factually true that, as alleged, Respondent "refused to accept an employment application from" the four named alleged discriminatees,¹⁶ it is fair to say that Respondent effectively failed to "offer employment" to them, as well as to "other individuals whose names are unknown to the [Acting Regional Director]," by virtue of attempting to position itself so as to avoid offering employment to any of the ex-strikers.

Indeed, the summary offered in Respondent Exhibit 13 identifies for us 3 former strikers as part of a group of 27 former employees who were actually interviewed and rejected after referral by OBES.¹⁷ While not expressly referred to in the charge filed by Sandra Shutts on April 12, 1989, the refusal to hire Douglas Andrew, Troy Elchert, and Richard Arthur was sufficiently "closely related" to the Shutts charge so as to be considered timely. *Redd-I, Inc.*, 290 NLRB 1115 (1988).¹⁸

But aside from these three instances, which happened to come into the record rather serendipitously, it seems fair to say that the use by Respondent of OBES and of the "no-former-employee" policy to guard against rehiring the ex-strikers probably affected a goodly number of that group, referred to in the complaint as "unknown" to the Acting Regional Director. It may further be argued that all former em-

ployees, whether ex-strikers or not, who were denied reemployment because of the unlawful policy, suffered from its fall-out and deserve remedial relief.

I am inclined, however, to limit the remedy to former employees who were strikers. The complaint refers only to them, and the prohibitive policy was directed at their exercise of Section 7 rights. Extending the remedy to all rejected former employees might result in failing to afford any redress to some of the intended victims of the policy.

As for the former strikers who were rebuffed by virtue of the "no-former-employee" ruse, they may present several kinds of problems. General Counsel cites *Love's Barbeque Restaurant v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), a successorship case, for the proposition that where a successor employer unlawfully discriminates in hiring, "an appropriate remedy is reinstatement for all the former employees." *Id.* at 1100. But the court went on to provide, relying on *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 602 (9th Cir. 1979), that a specific order of reinstatement of all 40 unhired employees (in *Vancouver*, it had been 72) was unenforceable, and a remand necessary, because it denied the successor employer "the opportunity to show that fewer than forty jobs would have been available." *Love's Barbeque Restaurant*, supra at 1102.

In similar vein, it seems to me that it could be the imposition of a penalty on Respondent, and a windfall to some strikers, to simply order reinstatement and backpay for all unrecalled strikers whose names remained on the list on and after October 11, 1988, more than a year having passed since the strike had ended and the contracted-for recall had begun, it may be that, by October 1988, a number of those unrecalled strikers had left the area or the labor market. Additional questions would arise as to when the backpay period would begin for each former striker who might otherwise be entitled to reinstatement, since the openings after October 1988 probably encompassed different classifications. In short, there may be various reasons, not all of them anticipated here, why offers of reinstatement should not be made or backpay should be curtailed, and I think it prudent not to indulge in uninformed "precision" (*Ibid.*) at this point.

I do not agree, however, with the "causation" arguments advanced by Respondent because I believe that Respondent's decision to use OBES after the recall period was part of its overall effort to deflect ex-striker applications, I find irrelevant the fact that OBES has not referred any of the former strikers named in the complaint.¹⁹

I further disagree with the contention that refusal-to-hire cases "must be dismissed where an alleged discriminatee fails to file an application or otherwise take steps to procure employment." The precedents cited by Respondent are all factually distinguishable. In the present case, I find a deliberate effort to avoid receiving applications from ex-strikers, by unnecessarily employing the services of OBES; adopting a "strict" no-former-employee policy despite the presumably known presence and availability of many longtime employees who had not quit or been fired like other former employees; and making readily available to the ex-strikers the knowledge that application—even with OBES—would be pointless.

¹⁵ I also would note that, in making my finding, I do not rely on the testimony of Teresa Henthorn, whose attribution of a remark to an unknown person cannot be used against Respondent (and, incidentally, is not significant).

¹⁶ Respondent's brief states that General Counsel proved that the "charging parties were strikers that had been replaced," but the record contains no evidence of "replacement" of the strikers named in the charges.

¹⁷ Curiously, Respondent's brief states, at p. 28, "Of these three strikers, we have no information about whether they may or may not have ultimately received jobs at Randall." Puckett, referring to R. Exh. 13, explicitly agreed with Respondent's counsel at the hearing that the exhibit showed "27 former employees who have not been rehired" (which included the three strikers) since hiring began in October 1988 and who, under the "no former employee policy," presumably should never be hired. And, moreover, at p. 7 of its brief, Respondent specifically notes that each of the three strikers "was rejected pursuant to Randall's strict policy against hiring former employees," and, at p. 17, refers to "the rejection of applications" from the three strikers.

¹⁸ If we were to assume that Douglas Andrew was actually interviewed and rejected on October 12, 1988, as suggested by R. Exh. 13 (the record testimony is that October 12 represents the date of his Randall application), there would be no problem under Sec. 10(b) even though the charge, which was mailed on April 12, was not actually received by Respondent until April 13, more than 6 months after the assumed date of the unfair labor practice. See *Laborers Local 264*, 216 NLRB 40, 43 fn.1 (1975), enf'd. 529 F.2d 778 (8th Cir. 1976).

¹⁹ It has, of course, referred, predictably to no avail, the three strikers earlier discussed.

More relevant here are the successor-refusal-to-hire cases. See, e.g., *Love's Barbeque*, supra, where discrimination was found and, despite the fact that only 9 former employees actually applied to work for the new owner, the Court agreed that a remedy could be available to as many as 30-40 former employees. The Board and courts have frequently held that when it is futile for employees to file applications, failure to file is unimportant. *Shortway Suburban Lines*, 286 NLRB 323, 326 (1987); *Macomb Block & Supply*, 223 NLRB 1285, 1286 (1976); *American Press, Inc. v. NLRB*, supra; *Packing House Services v. NLRB*, 590 F.2d 688, 696 (8th Cir 1978). And see *Kessel Food Markets*, 287 NLRB 426, 431 (1987). ("Nonapplicants have been considered discriminatees in situations when . . . an employer structures its hiring practice to prevent the predecessor's employees from applying. Nonapplicants have also been considered discriminatees when an employer declines to hire any of the predecessor's employees for unlawful considerations.")

Nonetheless, as I have noted above, there may well be employees who will be shown, at the compliance stage, as not available for or interested in employment after October 11, 1988. Unlike the successorship cases, where a presumption of interest in continued employment may be entertained, here more than a year had passed since the strike had ended and the October hiring had begun.

CONCLUSIONS OF LAW

1. The Respondent, Randall Division of Textron, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Brotherhood of Carpenters and Joiners of America, Local Union No 2540, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By its refusal after October 11, 1988, to consider for employment its former employees because of the protected concerted activity of these employees during the 1987 strike, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent discriminatorily refused to consider for employment its former employees who went on strike in 1987, I recommend that the Board order that their employment status be restored to what it would have been but for the discrimination against them, and that, in accordance with the preceding discussion, the Respondent offer them immediate reemployment, discharging, if necessary, employees hired from other sources, and make them whole for any net loss of earnings that they may have suffered due to the discrimination practiced against them, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend issuance of a cease-and-desist order and the traditional notice posting.

[Recommended Order omitted from publication.]